No. 2697

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN RE SOUTHERN ARIZONA SMELTING COMPANY, a corporation, *Bankrupt,*

JOHN H. MARTIN, as Trustee of the Estate of Imprial Copper Company, a corporation, Bankrupt, *Petitioner,*

vs.

M. P. FREEMAN, as Trustee of the Estate of Southern Arizona Smelting Company, a corporation, Bankrupt, *Respondent.*

BRIEF FOR RESPONDENT

ELLENWOOD & ROSS,
SELEM M. FRANKLIN,
Attorneys for Respondent.

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SELEM M. FRANKLIN,
Attorneys for Respondent.

The only question involved in this appeal is whether or not a writ of attachment levied on property of the bankrupt within four months from the filing of an voluntary petition and the adjudication thereon, is made void by the Bankruptcy Act.

In the case of *First National Bank vs. Staake,* 202 U. S. 141-149, the court said:

"'To what extent liens obtained by prior judicial proceedings shall be recognized is a matter wholly within the discretion of Congress. It might have validated all such liens, even though obtained the day before proceedings were instituted. It might probably have invalidated all such liens whenever obtained. It took a middle course, and invalidated all liens obtained through legal proceedings within four months prior to the filing of the petition . . . .".

First Nat. Bank vs. Staake, 202 U. S. 141-149, 50 L. Ed. 969-70.

Prior to the rendition of this decision the Circuit Court of Appeals, 2nd District, by *Lacombe in re Kenney,* 105 Fed. 897, 45 C. C. A., 113, in construing 67f, said:

"There can be no doubt that it was the intention of Congress by this section to prohibit creditors of a bankrupt from obtaining preferences over other creditors, as the result of any legal proceedings against him, during the period of four months prior to the filing of the petition; and apt words are used to express that intention. The property of the bankrupt is safeguarded against all such proceedings by the provision that such of them as would ordinarily be liens against such bankrupt shall be deemed null and void, and the property wholly discharged and released from the same. A broad and liberal construction of the section should be adopted if necessary to effect this intent, but no strained construction is necessary in the face of language so comprehensive."

In re *Federal Biscuit Co.,* 214 Fed. (2nd C. C. A.) 221 226, the court, in construing Sec. 67f of the Bankruptcy Act, said:

"A lien acquired by an attachment of an insolvent debtor is a lien 'obtained through legal proceedings' and is, by the express terms of the Bankruptcy Act, par. 67f, dissolved by the filing of a petition in bankruptcy by or against the debtor, if that occurs within

> four months after its date. And the effect of the statute in dissolving attachments is not confined to those issuing from courts of the United States, but applies as well tothe process o fthe state courts."

In re *Forbes,* 108 C. C. A. 191, 186 Fed. 79-93, this Honorable court said:

> "But the provision of section 67f is not limited in the annulment of liens to property that passes to the trustee. It is general and sweeping, and applies to liens acquired through legal proceedings against the bankrupt during the four months period prior to his filing his petition in bankruptcy. Collier on Bankruptcy (8th Ed.) p. 161. There is some conflict in the authorities upon this question, but we think the interpretation placed upon the statute by Judge Jones in the case of in re *Tune* (D. C.) 115 Fed. 906, is correct."

The decision of Judge Jones, above referred to, is quoted and made part of the decision of the Circuit Court of Appeals itself. In this decision, amongst other things, is the following:

> "The main reason for the four-months provision was to prevent the race by creditors to seize the estate of an insolvent when it is found that he is in failing circumstances, and to prevent the preferences which would follow if liens and attachments were allowed during that period."

In the case of Cook vs. Robinson, the lower court made an order vacating the attachment obtained within four months prior to the filing of the petition in bankruptcy.

The question was squarely presented to the court, whether or not under section 67f of the Bankruptcy Act, proof had to be made of the insolvency of the debtor on the day the attachment was levied, or whether the fact that he was declared insolvent, of itself vacated the writ of attachment levied within four months from the filing of the petition.

The court held that whether the debtor was insolvent or not at the time the attachment was levied was utterly immaterial; that the insolvency of the debtor having been established by the adjudication of bankruptcy, the lien of attachment obtained during the four months, was vacated and whether the debtor was insolvent on the day the attachment was levied, was utterly immaterial.

The court said:

> "So that the plaintiff in error is precluded by the adjudication to question the insolvency of Robinson at the time of the filing of the petition in bankruptcy, and it does not affect the case that Robinson may not have been insolvent at the time the attachments of Cook were levied. This for the reason that by subdivision 'f' of Section 67 all attachments levied against a person insolvent at any time within four months prior to the filing of the petition in bankruptcy, are deemed null and void in case the adjudication in bankruptcy is made. The attachment is annulled by force of the adjudication and the trustee becomes entitled to the property free of the lien or encumbrances thereof."

The court cites with approval the case of Bear vs. Chase, 40 C. C. A. 182, 99 Fed. 920-927. In the case of Bear vs. Chase, section 67f is fully considered, and in regard thereto that court, amongst other things, said:

> "This section is broad and comprehensive in its terms and too clear to admit of serious controversy. Under it no preference can be acquired by the levy of attachments within four months of the filing of a petition in bankruptcy. . . . . In the case of Re Kennedy, supra, also previously reported in 95 Fed. 427, Judge Brown of the District Court of the southern District of New York, a judge of great learning and ability, fully considered this question, and in each decision held that liens acquired within four months of the filing of a petition in bankruptcy were annulled by

the subsequent adjudication of the bankrupt. To the same effect are the decisions of several other of the District Courts. In re Reichman, 91 Fed. 624; In re Fellerath, 95 Fed. 121; In re Rome Planing Mill, 96 Fed. 812; In re Vaughan, 97 Fed. 560; In re Higgins, Id. 775; In re Burrus, Id. 926.

This section has also been construed recently by the Circuit Court of Appeals, for the 7th Circuit (In re Richards, 37 C. C. A. 634, 96 Fed. 935) and there the lien was declared to become null and void by the subsequent adjudication of bankruptcy. In this decision, delivered by Jenkins, Circuit Judge, it is said, in discussing the apparent inconsistency between sub-division "c" and "f" of Section 67 of the bankruptcy law:

'But sub-division "f" is broader in its scope, and avoids all liens obtained through legal proceedings within the time stated against a person who is insolvent, within the meaning of the subdivision, irrespective of knowledge on the part of the creditor of the fact of insolvency, and irrespective of the question whether the obtaining of the lien was in any way suffered and permitted by the debtor. It avoids all liens obtained through legal proceedings against a person who is insolvent within four months before the filing of the petition.'"

The court in the case of Bear vs. Chase, further said:

"The power of the United States District Court to enjoin and restrain the parties from the further prosecution of the suits in the state court was plenary, and should have been exercised because necessary to the maintenance of its jurisdiction and the due administration of the bankrupt law." (Citing many authorities.)

The Circuit Court of Appeals for the Ninth Circuit again, in the case of *Folger vs. Putnam*, 194 Fed. 793, 114 C. C. A. 513, says:

"Section 67f provides that levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any time

within four months prior to the filing of the petition in bankruptcy, shall be null and void in case he is adjudged a bankrupt, and that the property vacated thereby shall be wholly discharged and released from the same. It has been held and determined that subdivision "c" is repugnant to the provisions of subdivision "f" on the same subject, and that the latter provisions are controlling."

We therefore submit that it was immaterial whether the Southern Arizona Smelting Company, Bankrupt, was insolvent or not, as the attachment was levied within four months prior to the adjudication of bankruptcy.

Respectfully submitted,

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